IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 60

REVEREND E. S. EVANS, *et al.*,

Petitioners,

v.

GUYTON G. ABNEY, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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INDEX

Table of Cases

Authorities

Statutes

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above-entitled case on December 5, 1968.[1]

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[1] Petitioners herein are Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall and Rev. Van J. Malone. The respondents, i.e., appellees in the court below, are Guyton G. Abney, J. D. Crump, T. I. Denmark, Dr. W. G. Lee, Successor Trustees under the Will of A. O. Bacon; the City of Macon, Georgia; the Citizens and Southern National Bank and Willis B. Sparks, Jr., as Executors of the Will of A. O. B. Sparks; Willis B. Sparks, Jr. and M. Garten Sparks, Virginia Lamar Sparks and M. Barton Sparks, Heirs at Law of A. O. Bacon; Charles Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams, Mrs. Kenneth Dunwoody, A. M. Anderson, Mrs. W. E. Pendleton, Jr., Mrs. R. A. McCord, Jr. and Mrs. Dan O'Callaghan, Members of the Board of Managers under the Will of A. O. Bacon; Hugh M. Comer, Lawton Miller and B. L. Register, Successor Trustees in lieu of the City of Macon.

Opinions Below

The letter opinion of the Judge of the Superior Court of Bibb County dated December 1, 1967, and filed May 14, 1968 (Appendix p. 1a, *infra*, R. 1007-1012) is unreported. The opinion of the Supreme Court of Georgia filed December 5, 1968, is reported at 165 S.E.2d 160 (Appendix p. 16a, *infra*; R. 1112-1126). Earlier proceedings in this same case are reported *sub nom. Evans* v. *Newton*, 220 Ga. 280, 138 S.E.2d 573 (1964), reversed 382 U.S. 296 (1966), on remand, 221 Ga. 870, 148 S.E.2d 329 (1966).

Jurisdiction

The judgment of the Supreme Court of the State of Georgia was entered on December 5, 1968 (R. 1127; Appendix p. 26a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), the petitioners having claimed the violation of their rights under the Constitution of the United States.

Questions Presented

1. Whether, in the absence of any reversionary clause in the will leaving property in trust as a park, the imposition by the Georgia court of a reversion to the heirs on a showing that Negroes have used, and must be allowed to use the park, constitutes an infringement by state power on a federal interest declared and created by the Constitution, both by its immediate penalization of compliance with the Fourteenth Amendment, and by its operation to discourage desegregation.

2. Whether the holdings by the state court that this trust has "failed" and that *cy pres* cannot apply, rest on a

ground impermissible under the Fourteenth Amendment—the ground that the presence of Negroes frustrates the enjoyment of the park by whites, even though the latter, the intended beneficiaries, may use the park as freely as ever.

3. Whether the racially exclusory language in Senator Bacon's will must as a matter of federal law be treated as null and void, both because the provisions were meant to form and did actually form a part of the public law material by which the City conducted its parks, and because federal law, in commanding equality between the races, commanded and by operation of law brought it about that this park, since it was "dedicated in perpetuity" to whites, must also be taken to be "dedicated in perpetuity" to Negroes.

Statutes Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves the following Georgia statutes:

a. Georgia Code Section 69-504:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

> *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only,

or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

b. Georgia Code Section 69-505:

Ga. Code §69-505 (1933) (Acts, 1905, pp. 117, 118):

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used (sic) and enjoyment thereof.

c. Georgia Code Section 108-202:

Cy pres.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

d. Georgia Code Section 113-815:

Charitable devise or bequest. Cy pres doctrine, application of.—A devise or bequest to a charitable use

will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Statement of the Case

Petitioners are Negro citizens in Macon, Georgia who have sought in this extended litigation to desegregate Baconsfield Park, a previously all-white municipal park left to the City of Macon by the will of the late United States Senator Augustus Octavius Bacon. The case was reviewed by this Court once before in *Evans* v. *Newton,* 382 U.S. 296 (1966). The present petition seeks a review of a ruling by the Georgia courts that as a consequence of this Court's holding that the Fourteenth Amendment forbids the exclusion of Negro citizens from the park, Bacon's trust fails and the park and other trust property is forfeited by the City and reverts to the heirs of Senator Bacon.

The early course of the lawsuit, which was begun in the Superior Court of Bibb County, Georgia on May 4, 1963, is briefly summarized in the following excerpt from the opinion by Mr. Justice Douglas for the Court, *Evans* v. *Newton,* 382 U.S. 296, 297-298:

> In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was

of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

Thereupon, individual members of the Board of Managers of the Park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and be-

queath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573.

This Court, in reversing the judgment of the Georgia Supreme Court, ruled that the park was "a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law" (382 U.S. at 302).

Immediately after this Court's decision, the Supreme Court of Georgia delivered a second opinion setting forth the view that the purpose for which the Baconsfield Trust was created had become impossible to accomplish and had terminated. *Evans* v. *Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966). However, the judgment did not direct that the Superior Court on remand enter any particular order, but merely ruled that the court should pass on contentions of the parties not previously decided, and said that the "judgment of the Supreme Court of the United States is made the judgment of this Court" (148 S.E.2d at 331).

On remand in the Superior Court of Bibb County, a Motion for Summary Judgment (R. 136-141) (which was subsequently amended and supplemented by three additional pleadings (R. 622; 930; 939) was filed by Guyton G. Abney, et al. as Successor Trustees under the Last Will and Testament of Senator Augustus Octavius Bacon. The motion asked that the court rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted to movants as successor trustees under Item 6th of Bacon's will, and to certain named heirs of Senator Bacon (R. 141). The motion was opposed by petitioners, Rev. E. S. Evans, et al., the Negro citizens of Macon who

had earlier intervened seeking the racially nondiscriminatory operation of Baconsfield Park, by the filing of a response (R. 157-160) and four supplemental responses to the summary judgment motion (R. 371-374, 695-706, 917-918, 971). Petitioners filed numerous exhibits, as well as depositions, affidavits, answers to interrogatories and stipulations setting forth additional facts. Petitioners objected on federal constitutional grounds based on the due process and equal protection clauses of the Fourteenth Amendment, as well as on state law grounds, to the relief sought by the successor trustees and heirs. The heirs also filed several affidavits and exhibits supplementing the factual record. None of the other parties to the case, including the City of Macon, the Trustees of Baconsfield named by the court's order of March 10, 1964, or the members of the Board of Managers of Baconsfield (who initiated this lawsuit) either opposed the granting of the relief requested in the Motion for Summary Judgment, or offered any evidence. The court heard oral arguments on June 29, 1967, and granted the parties time to file further documentary evidence, which was filed.

At the hearing the petitioners, Evans, et al., suggested that the Attorney General of Georgia should be made a party to the case. By order dated July 21, 1967, the Attorney General was made a party pursuant to Georgia Code Section 108-212 (Acts 1952, pp. 121, 122; 1962, p. 527). The Attorney General of Georgia filed a "Response" opposing the relief requested by the heirs and supporting the position of the intervenors E. S. Evans, et al. that the doctrine of *cy pres* should be applied to save the trust (R. 975-988).

The Superior Court, granted the relief requested in the successor trustees' and heirs' Motion for Summary Judgment, ruling that the trust established by Senator Bacon failed immediately upon this Court's ruling in January

1966, that the City of Macon was dismissed from the case, and that the trust assets reverted to the successor trustees and heirs (R. 999-1006). In addition, the court ruled that the doctrine of *cy pres* was not applicable, that there was no dedication to the public, that the heirs were not estopped and that no federal constitutional rights of intervenors were violated by the reversion of the trust assets (*id.*). The Superior Court order and decree was entered May 14, 1968 (*id.*).

Petitioners duly appealed to the Supreme Court of Georgia, which filed an opinion December 5, 1968, affirming the decree of the Bibb Superior Court, and rejected petitioners' federal constitutional claims (R. 1112-1126). The court below stayed its remittitur and further proceedings pending the disposition of a timely petition for certiorari in this Court (R. 1130).

While the record filed with this case includes the entire record of proceedings before this Court on the prior petition, it also includes a good deal of additional factual data and evidence presented to the Superior Court on remand. The evidence develops the history of Baconsfield Park, and shows in great detail the substantial governmental investment, including the expenditure of both city and federal government funds, in establishing, improving and maintaining Baconsfield Park.

The Will

Senator A. O. Bacon provided in Item 9th of his Will (R. 16-34), signed in 1911 and probated in 1914, for the disposition of his farm called Baconsfield. He left the property in trust for the use of his wife and daughters during their lives (R. 22-23) and provided that after their deaths:

> . . . it is my will that all right, title and interest in and to said property hereinbefore described and

> bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. (R. 23)

The will provided for a seven member all-white Board of Managers to be chosen by the Mayor and Council of Macon (R. 23) and for the Board to have power to regulate the park, including discretion to admit men (R. 24). Senator Bacon directed that a portion of the property be used to gain income for the upkeep of the park (R. 24). He directed that "in no event and under no circumstances" should either the park property or the income-producing area be sold or otherwise alienated, and specified that except for the designated income-producing area the property "shall forever, and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified" (R. 24). The will stated Senator Bacon's belief that Negroes and whites should have separate recreation grounds (R. 25). It also stated his wish that the property be "preserved forever for the uses and purposes" indicated in the will, and that it be perpetually known as "Baconsfield" (R. 25). It provided that the trustees had no power to sell or dispose of the prop-

erty "under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others" (R. 26).

Item 10th of Senator Bacon's will bequeathed bonds, valued at $10,000, to the City of Macon with directions that the income be used for the preservation, maintenance and improvement of Baconsfield (R. 26). The will said that if the City was without legal power under the city charter to hold the funds in trust, the City should select a successor trustee (R. 27). Bacon gave a similar direction for the City to select a successor trustee "if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground . . ." (R. 27-28).

In a 1913 codicil, Senator Bacon noted that one of his daughters, Mrs. Augusta Curry, had predeceased him, and provided that her children should stand in her place in the disposition of the property, except that with respect to Baconsfield their interest would cease upon the death of his wife and his other daughter (R. 32-33). Item 3rd of the codicil provided, *inter alia*:

> To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks (R. 33).

In Item 4th of the codicil, it was provided that Custis Nottingham, one of the trustees and executors under the will, and his family, could occupy a house on Baconsfield

rent-free until the full expiration of the trust for which he was appointed (R. 33).

The City of Macon Acquires Baconsfield—1920

The City of Macon obtained possession of Baconsfield in February 1920, many years before the death of Senator Bacon's surviving daughter, by virtue of an agreement between the City and the trustees under the will, which was entered into with the written assent of all of Senator Bacon's heirs. The agreement is set forth in the Macon City Council Minutes of February 3, 1920 (Intervenors' Exhibit O; R. 710-712). Under the agreement between the City and the trustees, which recites that it was executed with the signed assent of all legatees and beneficiaries of the Bacon estate, the trustees conveyed Baconsfield to the City by deed, and also conveyed to the City to be covered into the City treasury the bonds and accumulated interest bequeathed by Item 10th of the will (*Id.*). The deed of Baconsfield to the City appears in the record as Intervenors' Exhibit F; it was executed February 4, 1920, and recorded February 10, 1920 (R. 650-652). In the agreement the City agreed to pay the trustees the sum of $1,665 annually during the life of Senator Bacon's daughter, Mrs. Sparks (R. 710-711). The City also agreed that it would appropriate 5% of the sum of the value of the bonds and accumulated interest each year, or $650 annually, for the improvement of Baconsfield Park (*Id.*). The City agreed not to charge any taxes or other assessments of any kind against the property (*Id.*). At the same time the City agreed with Custis Nottingham that he would terminate his occupancy of a house in Baconsfield in consideration of a cash payment of $5,100 from the City of Macon (Exhibit O R. 710). Nottingham's Quit Claim Deed to the City is Intervenors' Exhibit G (R. 653-654).

The City of Macon paid $5,100 to Custis Nottingham in consideration of his deed of his interest in Baconsfield (R. 711). The City of Macon paid the trustees under the will an annuity each year during the life of Mrs. Mary Louise Bacon Sparks. The Baconsfield annuity payments of $1,665 per year were regularly included in the Macon City budgets. (See, for example, budgets for the years 1939 and 1940, Intervenors' Exhibits T and U; R. 721, 722). Mrs. Sparks lived until May 31, 1944 (Intervenors' Exhibit W; R. 919). Accordingly, there were 25 payments of $1,665 from February 1920 through February 1944, and the City of Macon thus paid a total of $41,625 to the trustees under Bacon's will in order to acquire Baconsfield.

The Macon City Council Minutes of February 17, 1920 (Intervenors' Exhibit P; R. 713-714), reflect the fact that the City had taken over Baconsfield Park; that the council elected the first Board of Managers; that the Mayor of Macon, G. Glenn Toole, was elected to the Board of Managers; and that this election of the Mayor was requested by the trustees under Bacon's will, Messrs. Jordan and Nottingham, who wrote a letter to the Mayor stating:

> In turning over to the City of Macon the park devised to it by Senator Bacon, permit us to express the hope that this Park will mean all to the white citizens of Macon that Senator Bacon wished it to mean.
>
> The place is one of great natural beauty, but it could easily be marred by haphazard work. We are sure that before anything material is done to this property that you, the City Council, and the Commission appointed by it will have a well defined and permanent plan of improvement in view.
>
> We believe that it is of the utmost importance that you be a member of this Commission, and wish here to voice the hope that you will not decline such service

> from any false modesty. *It will greatly expedite the people's enjoyment of this property if the Commission is headed by the head of our City Government.* Differences in opinion and change of plans will be thus avoided, and the money essential to the improvement of this property will be expended by the one charged with raising it. (R. 713-714; emphasis added).

Mr. Toole, who was Mayor of Macon from 1918-1921 and from 1929-1933 (Heirs and Trustees Exhibit E; R. 931), remained a member of the Board of Managers until 1945. (Intervenors' Exhibit B, Baconsfield Minutes of May 30, 1945, and November 1, 1945; R. 557, 560, 563-564).

City Administration and Financial Aid to the Park and Federal Government Aid

Mr. T. Cleveland James was Superintendent of Parks of the City of Macon from 1915 to the time of his Deposition in April 1967 (R. 285-286). He developed most of Macon's parks, including Baconsfield and exercised general supervision over Baconsfield for many years. He testified that Baconsfield was a "wilderness" with "undergrowth everywhere" and no facilities at the time the Mayor directed him to take charge of the park (R. 278; 307). Supt. James initially developed Baconsfield Park using workmen who were paid by the federal Works Progress Administration, an agency of the United States. The W.P.A. men were working at Baconsfield under his supervision for a period he estimated as a year or more (R. 283, 307). The federally paid workmen cleared the underbrush, cleared foot paths, built footbridges, dug ponds, built benches, planted trees and flowers and generally performed landscaping work in Baconsfield Park (R. 278-284, 287). The W.P.A. workers did similar work in other city parks under the supervision of the City Park Superintendent (R. 298). Mr. James'

testimony is supplemented and corroborated by W.P.A. records from the archives of the United States (Intervenors' Exhibit E; R. 595-649) which reflect that Works Progress Administration Work Project No. 244 involved landscaping city parks in Macon, Georgia under the supervision of the City Park Superintendent. The W.P.A. records indicate that W.P.A. Project No. 244 was approved August 7, 1935; that the federal government paid $120,032.35 for 469,079 man hours of work; and that the sponsor (City of Macon) paid $17,923.43 for work on the project (R. 599). The W.P.A. records do not indicate how much of the labor was at Baconsfield and how much was at other city parks. But, Mr. James' testimony indicates that W.P.A. work at Baconsfield was very extensive (R. 307):

Q. Will you describe for us very briefly what you meant when you said Baconsfield Park was a wilderness when you first went out there?

A. Well, there wasn't nothing there but just undergrowth everywhere, one road through there and that's all, one paved road.

Q. And no facilities out there; is that correct?

A. No.

Q. And how long did it take you to turn it into a usable park?

A. Oh, about 6 or 8 months, probably a year.

Q. I see, and you used employees fairly regularly during all of that year?

A. Yes.

Q. Every day?

A. Well, we had the PWA labor, trying to get me to give them something to do, you know, and I worked them over there.

Q. You say you used the PWA employees for maybe a year?

A. I expect I did, yes, that is what I did my work with.

The minutes of the Baconsfield Board of Managers meeting held March 30, 1936 (Intervenors' Exhibit B; R. 507-509), indicate that considerable development, landscaping and planting had been done in the park during the preceding 12 months. No earlier minutes of the Board are available (R. 507). However, the Board minutes indicate an extensive pattern of governmental involvement in the maintenance of the park from 1936 until the City resigned as trustee of the park in 1964. (The minutes from 1936-1945 are Exhibit B, R. 506-565. The minutes from 1945-1967 are Exhibit A, R. 376-505). The City's involvement in the operation of the park was manifested in a great number of ways. For example, for a twelve year period from 1936 to 1948, all but one of twenty-one meetings of the Board of Managers of Baconsfield took place in the Mayor's office or elsewhere in Macon's City Hall. During the same period the Mayor of Macon attended 16 of the 21 meetings. (See, generally, Intervenors' Exhibits A and B *supra*). The minutes reflect that over an extended period of years the Board of Managers frequently requested and obtained assistance from the City of Macon in developing and improving the park. On occasion the minutes of the Board of Managers refer to Baconsfield variously as a "municipal park" (Intervenors' Exhibit A, Minutes of 5/6/53; R. 403) and to "Baconsfield and the other public parks of the City of Macon" (Intervenors' Exhibit A, resolution following minutes of 11/1/45; R. 564).

The deposition of Park Superintendent James and the Board of Managers' minutes indicate positively and conclusively that Baconsfield Park was maintained and operated as an integral part of the City park system from the time the park was first developed until the City resigned as trustee in 1964. Park department employees under Mr. James' supervision maintained Baconsfield just as they did all of the other city parks (R. 276, 289-290, 306). Mr. James

estimated that the City spent about $5,000 for flowers and plants in Baconsfield during the years he worked there, and additional amounts were spent by the Board of Managers for gardening supplies (R. 295-296). In 1938, the United States government gave to the park 144 bamboo plants, representing six different varieties of bamboo (Intervenors' Exhibit B, Minutes of 6/28/38; R. 525). Mr. James regularly assigned men from the city Park Department to work in Baconsfield as the need arose (R. 276). City workers did all the general maintenance work in the park until 1964 (R. 278). For a period of years, Mr. James, the City Superintendent of Parks, lived in Baconsfield Park, occupying a home rent free. (Minutes of 10/16/47; Exhibit A; R. 391). The substantial value of the city's contribution of labor for upkeep of the park is demonstrated by the increase in the board's maintenance expenditures after the City resigned as trustee of the park in 1964 (R. 332-333). The amounts spent by the Board of Managers for maintenance in the years 1960-1966 were as follows:

1960 — $1,307.20
1961 — $1,645.72
1962 — $1,995.57
1963 — $1,465.20
1964 — $6,545.78
1965 — $7,073.80
1966 — $6,675.89

(Board of Managers' Answer to Interrogatory No. 9; R. 174.) The Chairman of the Board of Managers agreed that the cost increase in 1964 and thereafter was attributable to the fact that the City withdrew its services, and it became necessary for the board to pay for services which had previously been furnished by the City Parks Department (R. 332-333). The Mayor of Macon testified that he ordered all city employees to stop working at Baconsfield after the City resigned as trustee in 1964.

Baconsfield Clubhouse—Built by Federal Government

There is a two story brick building known as the Baconsfield Clubhouse located in the park. The clubhouse was built in 1939 by the Works Progress Administration (W.P.A.), an agency of the United States (Intervenors' Exhibits J (R. 708-709), K (R. 724-841), L (R. 842-846), M (R. 847-910), N (R. 911-913 and R (R. 718-719)). The clubhouse construction project was sponsored by the City of Macon acting in conjunction with a private group known as the Women's Clubhouse Commission. In its application for federal funds for this project, the City of Macon, by its Mayor and Treasurer, executed numerous documents constituting agreements, assurances, certificates, representations and contracts which are contained within the W.P.A. records (Intervenors' Exhibits K (R. 724-841) and M (R. 847-910)). The City in several documents represented to the United States that the City was the sole owner of the Baconsfield Park property (R. 774, 788-789), *that the City's ownership was "perpetual," that there were no reversionary or revocation clauses in the ownership documents* (R. 789), that the property was not private property (id.), and certified that the proposed clubhouse project was "for the use or benefit of the public" (R. 796, 808). Federal funds totaling $16,512.80 were expended to construct the clubhouse (see Intervenors' Exhibits L (R. 842-846) and N (R. 911-913)). The city officials signed documents indicating that the sponsor's (City's) share of construction costs would be financed out of the "regular tax fund with the assistance of the Women's Club of Macon" (Intervenors' Exhibit K; R. 774). The Women's Club had agreed to contribute $3,000 (Intervenors' Exhibit R; R. 718). The sponsor's (City's) share of the construction costs finally amounted to $8,376.91 (R. 846, 913). The total costs of the clubhouse, including the federal contributions ($16,512.80; R. 845, 912) was $24,889.71 (Intervenors' Exhibits L and N).

In a sworn certificate executed under oath by the Mayor and Treasurer of the City of Macon on October 14, 1938, quoted in full below, the City promised that there would be no discrimination against any group or individual in the use of the clubhouse or the property upon which it was located, and *that the City did not intend to lease, sell, donate or otherwise convey title or release jurisdiction* of the property during the useful life of the improvements built with federal funds. The certificate contained in Intervenors' Exhibit K, reads as follows (R. 822):

> With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project applications, as "Baconsfield Club House" will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party or parties who may desire the use of the building and the property upon which the building is located.
>
> It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate or otherwise convey title or release jurisdiction of the property together with improvements made thereon, during the useful life of the improvements placed thereon through the aid of W. P. A. funds.
>
> It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be maintained for the general use and benefit of the pub-

lic, and will not be used for the profit or benefit of any one individual or specific group or organization; and the management of the property, together with improvements made thereon, will at all times be subject to the approval of the designated city official or officials of the City of Macon, who will be responsible to see that the foregoing certification is adhered to.

/s/ Charles L. Bowden
Mayor, City of Macon, Georgia

/s/ Frank Branan
Treasurer, City of Macon, Georgia

Another similar certificate or agreement containing assurances that the property "will not be leased, sold, donated or otherwise disposed of to any private individual or corporation, or to a quasi-public organization during the operation of the project" and would be "maintained by the Women's Club and operated for the benefit of the general public," was executed September 7, 1938, by the Mayor and Treasurer of the City of Macon and by the President and Treasurer of the Women's Club House Commission (Intervenors' Exhibit M at R. 889).

The Women's Club continues to occupy the clubhouse in Baconsfield Park, using the building free of charge and without paying rent either to the City or to the Board of Managers. The Women's Club charges fees for various organizations which use the building for meetings, but none of these funds go to the City or to the Board of Managers (R. 212-219, 312-315, 328-331). Mayor Merritt of Macon testified that he has attended meetings at the Clubhouse of such organizations as the Georgia Legal Secretaries Association, the Georgia Milk Dealers Association, and several

other local associations of various types (R. 216, 218). The minutes of the Board of Managers of Baconsfield indicate that the Board permitted the Highland Hill Baptist Church to use the Baconsfield Clubhouse as the temporary meeting place for the church during the construction of the church. The Board voted this permission for the church to use the Clubhouse at its meeting of June 25, 1953, notwithstanding its attorney's advice that this use was not permitted by Senator Bacon's will (Exhibit A, Minutes of 6/25/53; R. 404-407). A letter from the Chairman of the Board of Deacons of Highland Hill Baptist Church thanking the Board for the use of the Clubhouse as a meeting place for the church was read at the Baconsfield Board meeting of May 17, 1955 (Exhibit A, Minutes of 5/17/55; R. 424).

Public Roads in the Park

Certain roads running through Baconsfield Park were paved and developed by the City (R. 224-227; 279-280; see also, Intervenors' Exhibit A, Minutes of 5/17/55 (R. 425-426). On several occasions the Board of Managers resolved to seek federal funds for the paving of roadways in the park, but the record does not indicate whether any federal highway funds were actually obtained (see Intervenors' Exhibit B, Minutes of 3/30/36 (R. 508-509); 6/28/38 (R. 526); and 10/12/38 (R. 527)). On one occasion the City paid the Board of Managers the sum of $1,000 as "partial reimbursement from City of Macon for paving in Baconsfield." (Intervenors' Exhibit A, financial statement following Minutes of 10/16/47; R. 393).

City-Built Swimming Pool and Bathhouses at Baconsfield

As early as 1936, the Board of Managers of Baconsfield began discussing the desirability of constructing a swimming pool in the park, and the discussion of government

aid for a pool continued for years (Intervenors' Exhibit B, Minutes of 6/29/36 (R. 512), 7/30/36 (R. 514), 12/7/36 (R. 517), 12/14/44 (R. 549), 5/30/45 (R. 551-557)). Finally, on June 3, 1947, the Chairman of the Board of Managers met with the Mayor and several aldermen of Macon and "strongly urged" that the City appropriate $100,000 to build a pool in Baconsfield. (See Intervenors' Exhibit A, Minutes of 6/3/47; R. 382-383.) The City agreed to this suggestion and on July 22, 1947, resolved to deliver the sum of One Hundred Thousand Dollars to the Board of Managers of Baconsfield to be used by the Board for the construction of a swimming pool. (Intervenors' Exhibit I; R. 686; see also, Intervenors' Exhibit V; R. 723.) Subsequently, the City appropriated an additional Forty Thousand Dollars on December 23, 1947 to the Recreation Department to construct bathhouses at Baconsfield pool (Intervenors' Exhibit I; R. 686). The Baconsfield minutes indicate that the Board of Managers accepted the $100,000 grant and designated the Chairman and Secretary of the Board of Managers and the Chairmen of the City Council's Finance and Recreation committees to act as agents to construct the pool and disburse the funds from a special swimming pool account. (Intervenors' Exhibit A, Minutes of 8/4/47; R. 386-388.) A large community swimming pool and adjacent buildings were constructed in 1948 on a portion of the Baconsfield land designated in Bacon's will as income-producing property. After the pool was constructed the Board of Managers and the City entered into a contract by which the pool was leased by the Board to the City for a two year term, to be automatically renewed for successive two year terms unless either party terminated the lease or the City breached its covenants (Heirs' Exhibit D; R. 678-683). The City agreed to operate the pool:

> . . . as a part of the pleasure and recreational facilities of Baconsfield, for the enjoyment and benefit of

the beneficiaries of the trust for Baconsfield, as set up and established in the said last will and testament of the said A. O. Bacon, deceased, and also for other persons who are or may be admitted to Baconsfield (R. 680).

The City agreed to bear any losses in connection with the pool operation, and to share any profits with the Board. No payments to the Board were made under this provision (Heirs' Exhibit H and attached letter; R. 941-945). The City made additional capital expenditures at the pool and related facilities over the years for improvements, including the following amounts (Heirs' Exhibit H; R. 944):

1948	$ 4,999.57
1960	6,079.21
1962	6,360.55
	$17,439.33

The sum of $1,084.93, which remained in the old swimming pool account was transferred to the regular account of the Board of Managers in 1959. (Intervenors' Exhibit A, Minutes of 5/8/59; R. 451, and financial statement following Minutes of 10/29/59; R. 456.)

The pool was finally closed and the lease cancelled in 1964 in order to avoid racial desegregation as required by the Fourteenth Amendment. In April 1963, following attempts by Negro groups to integrate the park, the Board resolved to cancel its contract with the City relating to the pool and to attempt to negotiate a contract with a private party for operation of the pool (Minutes of 4/9/63; R. 483-484). At the same time, the Board directed its attorneys to commence this lawsuit to remove the City as trustee (Id.). The swimming pool contract was finally cancelled in May 1964. The Board's attorney wrote a letter

to Mayor Merritt dated May 22, 1964 (Intervenors' Exhibit X; R. 921-923) stating that it was cancelling the pool lease because of the City's inability to enforce racial segregation at the pool. The Mayor replied by letter dated May 28, 1964 (Intervenors' Exhibit Y; R. 924), acquiescing in the termination and relinquishing control of the pool to the Board of Managers. The swimming pool has remained closed since that time, and has not been maintained or kept in repair since 1964. Nearby highway construction which interfered with the pool area during a period of time has now been completed, but the pool remains closed.

City Operated Zoo

The City established a zoo in Baconsfield Park, with caged animals, including monkeys, a bear, ducks, rabbits, a raccoon, a few deer, and a few peafowl and pheasants. (Answer of Board to Interrogatory No. 2; R. 172-173.) Mayor Merritt stated that the zoo included 40 or 50 monkeys (R. 203). The zoo was closed and all the animals and cages removed after the City resigned as trustee in 1964. While the zoo was in operation the City employed a full-time employee at Baconsfield to take care of the animals (R. 205-206, 211, 290). The Public Works Department of Macon dismantled the zoo (R. 208).

Public School Playground

A playground in the Baconsfield Park is regularly used as the school playground for a nearby public school operated by the Bibb County Public School System. The school is Alexander School Number 3, a previously all white elementary school, which it was anticipated would be attended by a small number of Negro pupils living in the neighborhood under the school district's desegregation plan. (Intervenors' Exhibit W, Stipulation No. 2; R. 919.) The school personnel supervise the children in using the playground in Baconsfield (R. 235-236, 241-242). The Bibb

County Board of Education was responsible for having the playground installed, including basketball courts (R. 244, 262). Prior to 1964, the City Recreation Department had an employee assigned to the playground at Baconsfield to supervise the children. The City spent an average of $1,180.70 per year to employ someone at the playground prior to February 1964 (R. 237-241).

City Leased Building

From 1954 until the present time, the City has leased a building referred to as the Open Air School from the Board of Managers and paid the Board a rental of $300 per annum. (Exhibit A, Minutes of 6/24/54; R. 413; R. 246-251.) This is a one story brick building located in the portion of the Baconsfield property set aside for raising revenue (R. 246). The City in turn makes the building available, free of charge, to the Macon Young Women's Civic Club for the activities of the "Happy Hour Club," an organization of elderly people (R. 248-249). The building was previously occupied by the Board of Education rent free (Intervenors' Exhibit B, Minutes of 7/10/41; R. 541).

City-Aided Recreation Facilities

A Little League baseball field located in the park was constructed in part with the aid of the City which dumped 100 to 200 truck loads of dirt in a low area of Baconsfield where the field is now located (R. 219-222). The financial records of the Board indicated that it made a "part payment" to the City for filling in the play area in the amount of $3,500. (Exhibit A, financial statement following Minutes of 12/18/56; R. 437.) The minutes do not indicate any subsequent payments.

Several tennis courts are maintained in the park. The City of Macon assisted in installing lights at the tennis courts to permit play at night. (R. 228-229; Minutes of 7/24/62; R. 475.) In 1964, the Board of Managers granted

to the Macon Tennis Club, a private club, permission for the club to regulate play at the Baconsfield Tennis Courts according to the rules of the club, and permission to maintain the tennis courts. (Intervenors' Exhibit A, Minutes of 4/10/64; R. 492.)

Sale of Portion of Trust Property to State

During World War II, when informed that the War Department wanted a strip of land to open a roadway, the Board and the City sold a strip of land from the area of Baconsfield devised by Senator Bacon as income-producing property to the State Highway Board of Georgia. (See the deed and attached resolutions, Intervenors' Exhibit H; R. 655-660.) The Board of Managers received a check in the amount of $1,500 from the City of Macon in this transaction. (Intervenors' Exhibit B, Minutes of 3/3/42; R. 542-543, and financial statement following Minutes of 12/15/44; R. 550.)

Tax Exemption

The Board of Managers has never paid any taxes, federal, state, or local, on the Baconsfield property or on any of the income they have received. The property has always been treated as exempt from taxes under Georgia laws. (See Financial Statements in Intervenors' Exhibits A and B, *passim.*)

Income Property

The income-producing area of the trust property now includes a shopping center with several business, including a filling station, pharmacy, ice cream store, etc. The rental income of the Board of Managers during calendar year 1966 was $7,058.37. (Computed from Intervenors' Exhibit C; R. 569-592.) The rental income received during the period April 1, 1963, to March 31, 1964, was $5,225.04 (R. 346). During the years the Board also has received payment for various types of utility easements on the

property. In 1958, the Board received $3,500 from the City Board of Water Commissioners for a sewer easement. (Intervenors' Exhibit A, financial statement following Minutes of 5/8/58; R. 446.) The State Highway Department acquired 26.932 acres of land in Baconsfield by condemnation proceedings in 1964 to construct a portion of Interstate Highway 16. (Heirs' Exhibit I; R. 923.) The Board of Managers was awarded the sum of $131,000 in the condemnation, and the Court ordered that sum paid to the Chairman of the Board of Managers to be invested in short-term government bonds and to be held subject to the further order of the court pending the outcome of proceedings in the instant case (*ibid.*).

Assets of the Estate

The assets as of April 17, 1967, held by the First National Bank & Trust Company in Macon, as agent for the Board of Managers of Baconsfield, were stated by the Bank as follows (Intervenors' Exhibit D; R. 594):

"ASSETS:

Cash:		
Principal Cash Overdraft	$ 266.44	
Income Cash Balance	9,443.67	
		$ 9,177.23
Property:		
Real Estate	255,000.00	
U. S. Treasury Bonds	136,434.98	
Savings Account First National Bank	7,795.05	
		399,230.03
Total Assets		$408,407.26
LESS:		
Real Estate	255,000.00	
Highway Right of Way Fund	143,766.92	
		398,766.92
Rent Accumulation		$ 9,640.34"

The original trust fund of $10,000 in bonds left by Senator Bacon, was long ago "depleted" according to the City (City's Answer to Interrogatory No. 13; R. 153).

An accounting filed by the successor trustees with the court below on June 3, 1968, showed the total trust assets to be $404,810.77, including a book value for the real estate of $255,000 (R. 1055).

How the Federal Questions Were Raised and Decided

The petitioners' federal constitutional objections to the order of the court below ruling that the Baconsfield Park property had reverted to the heirs were stated in their Response to the motion for summary judgment (R. 157-160) and in their several supplemental responses (R. 371-374, 695-706, 917-918, 971). The federal constitutional objections were repeatedly and elaborately articulated. The following excerpts from the Supplemental Response and the Second Supplemental Response represent the general thrust of petitioners' argument as stated to the Superior Court:

> The entry of a judgment to the effect that the trust properties should revert to the heirs of Senator Bacon would violate the intervenors' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, in that:
>
> (a) A Judicial decree of reversion would not implement the intent of Senator Bacon's will, which expressed the legally incompatible intentions that (1) Negroes be excluded from Baconsfield Park, and (2) that Baconsfield Park be kept as a municipal park forever. A judicial choice between these incompatible

terms must be made in conformity with the said Fourteenth Amendment. The affirmative purpose of the trust, to have a park for white people, will not fail if the park is opened for all, and for the court to rule that the mere admission of Negroes to the park is such a detriment to white persons' use of the park as to frustrate the trust and cause it to fail, would be a violation of the said Fourteenth Amendment. (R. 371-372)

* * *

An application of the reverter doctrine or other doctrine finding a failure of the trust on the facts of this case would amount to a judicial sanction which imposed a penalty because the agencies managing Baconsfield Park fulfilled their Fourteenth Amendment obligation to operate the park on a racially non-discriminatory basis. The use of such a judicial sanction in these circumstances would violate the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 702)

—6—

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States require that the racially exclusionary words of Senator A. O. Bacon's will relating to Baconsfield Park be treated by the courts as *pro non scripto* as though they were never written. This is required, firstly, because the racially exclusionary terms were written in the will to conform to racially exclusionary suggestions and requirements of Georgia Code Section 69-504 (Georgia Acts 1905, p. 117). The racial portions of Section 69-504 are void under the Fourteenth Amendment, and indeed were void *ab initio* even under the "separate but equal" doctrine, by authorizing the

total exclusion of Negroes from public parks, and thus must be regarded as *pro non scripto.* Secondly, it is required because by the City's acceptance of the park, pursuant to Georgia Code Section 69-505 (Georgia Acts 1905, pp. 117-118), and its operation of the park in accordance with Bacon's will, the will was made a part of the City's own laws governing the operation and use of the park, and is to be treated in the same manner as if the racially exclusionary words appeared in a city ordinance. (R. 702-703)

—9—

By virtue of all the facts and circumstances presented on the record of this case the City of Macon has so invested the Baconsfield Park with a public character, and the City has become involved to such an inextricable extent, that it would be a violation of the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment for the state courts to apply any state law doctrines (whether relating to trust law, the law of dedication, real property law, or other principles), so as to defeat the rights of the intervenors to racially nondiscriminatory use and access to the park as a public park. (R. 704-705)

Before the Superior Court the constitutional claims were argued orally and were presented in full written briefs. The ruling of the trial court on petitioners' constitutional arguments was brief and general. The court stated in its order of May 14, 1967 (R. 1002):

> It is my opinion that Shelley vs. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this prop-

erty has reverted by operation of law in accordance with well settled principles of Georgia property law.

The federal questions were preserved on appeal by appropriate enumerations of error and again fully briefed before the Supreme Court of Georgia. The Supreme Court of Georgia also rejected petitioners' constitutional arguments on the merits. The court stated at the conclusion of its opinion (R. 1125-26):

> 6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Superior Court of Bibb County holding that the trust has failed and the property has reverted to Senator Bacon's estate by operation of law. We recognize the rule announced in Shelley v. Kraemer, 334 U.S. 1 (68 SC 836, 92 LE1161, 3ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.
>
> Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recreational area. They have not been deprived of their right to inherit, because they were given no inheritance.
>
> The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discrimi-

natory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

REASONS FOR GRANTING THE WRIT

I.

The Importance of the Question in the Framework of This Case.

A. *The Decision of the Georgia Court Frustrates This Court's Mandate in Evans* v. *Newton, 382 U.S. 296 (1966)*

It is evident that the decision to which this petition addresses itself makes a practical nullity of this Court's decision in *Evans* v. *Newton,* 382 U.S. 296 (1966). Whether it rightly does so is, of course, a matter for full argument. But it may be said *in limine* that this Court ought to scrutinize with plenary care a decision of a state court which utterly frustrates one of its own decisions in the same case.

But the repugnancy goes deeper than mere practical frustration. The proceedings of the Georgia court, it is submitted, have been directly disobedient to the clear implication of this Court's mandate.

When this Court uttered its prior decision in this case, the Georgia courts had taken one and only one action, with two aspects. They had accepted the City's resignation as trustee, and had appointed new trustees—all for the an-

nounced purpose of effecting racial discrimination. This Court "reversed" the Georgia decision. All there was to "reverse" was this substitution of trustees, and the "reversal" must therefore have amounted to a direction to reinstate the City as trustee. This has not been done.

To have obeyed this mandate would have brought it about that a public trustee, under a duty of defending the trust, would have continued a party to this action. The city of Macon, as trustee, would have been formally forced either to defend this trust against the heirs' claims or to account politically as trustee to *all* its citizens, white and colored, for its letting go by default the park they all will lose if it reverts. This position of the City might or might not have been decisive in shaping the fate of Baconsfield in the Georgia courts. But the hasty dismissal of the City as a party, in implicit disobedience to the mandate of this Court "reversing" a decree that dismissed the City as trustee, is at the least a peculiar circumstance in the case that ought to lead to full scrutiny.

B. *The Decision of the Georgia Court Is Inconsonant With Prior Decisions of This Court*

The Georgia court's decision cannot be squared with the doctrines of *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1867); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); and *Griffin* v. *County School Board*, 377 U.S. 218 (1964), amongst others, nor with the decision of the Third Circuit Court of Appeals in *Pennsylvania* v. *Brown*, 392 F.2d 120 (3rd Cir. 1968), cert. den. 391 U.S. 921 (1968), as will more fully be made to appear in II hereof.

C. *Allowing the Georgia Court's Decision to Stand Will Seem to Open a Fertile Field for Implementing Racial Discrimination, and Will Therefore Encourage Schemes Aiming at Such Discrimination*

The present case is a very strong one for scrutinizing the state court's action. First, the penalization by reverter is not in obedience to any private person's formed intent, but is rather by operation of present-day Georgia law (as is admitted by the Georgia court, see *infra,* p. 38). Secondly, the penalty operates not on a deliberately chosen breach of the terms of a deed or will, but on a breach *compelled* by the Fourteenth Amendment; the citizens of Macon are being deprived of their park because their city government is performing its federal duty. Thirdly, public rather than merely private interests are at stake.

If this Court lets stand without examination a case decreeing reversion on these extreme facts, the Georgia court's untouched ruling will be widely cited *a fortiori* to establish that the weapon of reverter is a legitimate one for enforcing racial discrimination in a vast range of circumstances. Racial discrimination will be reinvigorated and given new hope. This Court will in any case ultimately have to deal with the situation thereby created. The present case, for the reasons given, is an unusually favorable one for making a start.

II.

The Decree of the Court Below Is Hostile to the Petitioners' Right to Immunity From Racial Discrimination.

A. *The Decree of the Georgia Court Imposes the Drastic Penalty of Reverter on Compliance With the Fourteenth Amendment, and in so Doing Infringes Upon a Federal Interest Declared and Created by the Constitution, at the Same Time and by the Same Act Inflicting Detriment on the Petitioners and Encouraging Racial Discrimination*

The immediate contemporary facts presented by this record are simple and damning. A park was being operated by the city of Macon as trustee, and by a Board of Managers appointed by the City Council. The Fourteenth Amendment says that Negroes may not be excluded from a park so operated. Macon accordingly allowed Negroes to use the park. Upon this showing, the Georgia court decrees the extreme penalty of forfeiture of the property.

On the face of it, this constitutes a direct and drastic interference by the state of Georgia with a course of events charged with that high and positive federal interest which attaches to the commands of the Constitution. State power in no form and on no state-law doctrinal basis may take action hostile to a federal interest so expressed, and penalize that which the Constitution commands. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *Crandall* v. *Nevada,* 73 U.S. (6 Wall.) 35 (1867); cf. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); and *Barrows* v. *Jackson,* 346 U.S. 249 (1953).

It is clear, in addition, that this action of the Georgia court will operate as a discouragement to expeditious and voluntary compliance with the Fourteenth Amendment, and will encourage racial discrimination, *contra* the decision

in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). If this Georgia decision stands, it will be taken as a strong precedent (*supra*, I, C) supporting the proposition that state courts may generally decree reversion of property for breach of a racial condition. The use of this device, and compliance by those placed *in terrorem*, will undoubtedly be significant.

Where, as here, the reverter occurs as to public property, Negroes will be discouraged from asserting their rights since they will know (and be told) that such assertion would be a futility since reversion would attend their success; this might be of little significance in Macon, but it might well be highly significant in small communities with few Negro inhabitants. Cities, reciprocally, would be encouraged to evade as long as possible their duty to integrate. A potential discouragement of racial equality need not be absolutely certain or highly substantial in order to offend the Constitution. See *Robinson* v. *Florida*, 378 U.S. 153 (1964), where the fact that a restaurateur, if he should desegregate, would be directed to put in separate toilets, was held sufficient discouragement to make unconstitutional his, in fact, discriminatory rule.

It is true that the detriment here imposed for failure to keep Baconsfield white is not one directly avoidable by keeping Baconsfield white, since that is forbidden by the Fourteenth Amendment. It might be argued, then, that the sanction of reverter does not in this case foster racial discrimination, since the racial discrimination involved cannot permissibly occur in any case. The consequence of this argument would seem to be an absurdity—that a state may impose any forfeiture it likes on the performance of a compelled federal duty, even though it cannot impose any forfeiture on the same act when that act is not a federal duty. If the argument had force, a state could fine a man,

in a moderate sum, for paying his federal income tax, since he has to pay that tax anyway, and hence cannot be influenced not to pay it by the fear of a small fine. Sound federalism is not built of such scholastic spiderwebs. The imposition by a state of a forfeiture, on a showing that a federally imposed duty has been or will be performed by a municipality, is as noxious an interference with national supremacy as can well be imagined. U. S. Constitution, Art. VI; see *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *Crandall* v. *Nevada,* 73 U.S. 35 (1867).

A state which would thus impose a drastic forfeiture of property as a penalty for obedience to the Constitution, and, moreover, do so in a way that effectively discourages the assertion of federal rights and encourages their denial must surely come forward with some justification. The only justification even specious must be looked for in Senator Bacon's will. On examination, there are here two possibilities, one of which is totally and clearly demurrable, and the other of which, being entirely unsustained by the record, is admitted by the Georgia court not to exist in fact.

First, Senator Bacon clearly and seriously desired that Negroes be excluded from this publicly operated park. But neither he nor any other person has any lawful power to command such a result. That result can be attained only by the repeal of the Fourteenth Amendment. Senator Bacon's desire in this regard is no more effective in law than would have been an expressed direction that a colored citizen of Macon chosen by lot stand in the stocks in the park every Sunday. There can never have been any doubt about this, since at least 1956, and no party connected with this case ever seems to have doubted it, but any possible doubt was laid at rest by the decision of this Court in *Evans* v. *Newton,* 382 U.S. 296 (1966).

A quite different expressed or implied desire of Senator Bacon might be brought forward as justification for what has been done; it might be said that Senator Bacon intended, desired, or willed the reversion of this property to his heirs if Negroes had to be allowed to use the park. If such intent were discernible, or inferable, an interesting question would be presented. The categorical fact is, however, that Senator Bacon's intent, desire, or will in this regard is unknown and unknowable, and in overwhelming probability never was so much as formed. The Georgia court admits this unmistakably, saying that the reversion which it decrees occurs "because of a failure of the trust, *which Senator Bacon apparently did not contemplate and for which he made no provision.*" (R.1122; Appendix, *infra* p. 22a) (emphasis added).

Despite this admission, which entirely covers the ground, it will be useful briefly to show how thoroughly unknowable Senator Bacon's intent in this regard must remain. First, the Bacon will, and this whole record, are absolutely silent on this point. One must therefore recur to the probabilities. The question then is, would a Georgian who died over fifty years ago prefer to have his lovely farm remain as a park with some Negroes using it along with whites, or would he prefer to have it become mere city real estate, fully alienable, subject to all the vicissitudes affecting such property through the decades and centuries? On the latter alternative, Negroes certainly cannot be excluded. If a restaurant is opened on the property, Negroes must be served. If rent property is erected, Negro tenants cannot be rejected. If there are sidewalks, Negroes cannot be kept off them. Senator Bacon's announced ground for his exclusionary policy—the prevention of "social relations" among the races—cannot be attained, even as to this property, by a reversion, except for so long as it remains completely "private" and in the hands, by chance, of a special sort of

"private" owners. What wise lawyer in 1911 would have thought that alienable city real estate, descending from heir to heir, could be kept completely "private," and in the hands of those who would prevent racial interrelation?

Senator Bacon, moreover, formed and expressed his desire for racial exclusion against a background of seemingly permanent racial separation. His desire for his park was congruent with the social system in which he lived. If he had known that separation of the races in public facilities of all sorts was to become impossible in Georgia, would he have preferred to let his farm become city real estate rather than let it be a park conducted on the same lines as all other public facilities in the State? Of course, no one can know.

Senator Bacon's wish to have Negroes excluded was firmly expressed, but by no means more firmly than was his desire to have this park stay a park forever. No man can attribute to Senator Bacon any choice, even as a matter of probable hypothetical prediction, between these goals. No party in this case, as it now stands, has any claim to be considered as the agent of Senator Bacon's wishes. The admission of the Georgia court to this effect is compelled by the record.

The state of Georgia, having acted through its courts to decree forfeiture of public property on a showing that Negroes have used it and must be allowed to use it, cannot (and does not), therefore, proffer the justification that it is merely carrying out the command of a private testator. (It is highly questionable whether even that justification would suffice, but petitioners need not here argue the point.) The only possible justification remaining is that the reversion occurs "by operation of law." But law "operates" as a human act; in this case the act is that of the Georgia court. Cf. *Erie R.R.* v. *Tompkins,* 304 U.S. 69 (1938).

Georgia may have any rules of trust law she desires, declaring these by statute or by judicial decision. Or she may, if she wishes, have no law of trusts at all. The one reservation is that no state law, particular or general, legislative in origin or judicially fashioned, concerning "failure of trust" or concerning anything else, may penalize obedience to federal law. The ruling below does just that.

These petitioners have standing to assert the ground developed in this section. The constitutional norm against racial discrimination, obedience to which is being penalized here, runs primarily in their favor. Cf. *Barrows* v. *Jackson*, 346 U.S. 249 (1953). These petitioners have, in addition, a direct and substantial interest in the treatment of the claim they here assert; if it is upheld, then the decree pronouncing reversion of this property is reversed, the park continues as a park, and these petitioners are (by force of the Fourteenth Amendment) entitled to use that park. *Evans* v. *Newton*, 382 U.S. 296 (1966). They have standing, then, in both senses of the term—they are the centrally intended beneficiaries of the rule they invoke, and they will in fact benefit substantially from its application in this case.

Although petitioners have standing, it is worthwhile noting how very widespread would be the impact of the penalty here imposed on the City's performance of its Fourteenth Amendment duty. In taking away this park, Georgia destroys values built up by many persons and entities. The City has spent money on the park—money contributed over the years by its citizens. The tax immunity enjoyed by this park has been in effect a huge subsidy at the expense of taxpayers of all races. The federal government has contributed to the creation and to the improvement of the park, in part after an *express* certification that it was a nondiscriminating public facility.

The decree of the Georgia court destroys all these values, repudiates this certification, and wipes out the deep and total public character which decades of maintenance and subsidy have given to Baconsfield—without any warrant for this step in Bacon's directions, and solely on the showing that the Negro members of the public may now use this public place.

B. *The Judgment That This Trust Has "Failed," Though Its Intended Beneficiaries May Still Enjoy Its Benefits Just as Before, Can Rest Logically Only on the Proposition That, as a Matter of Law, the Presence of Negroes Spoils a Park for Whites, an Impermissible Ground Under the Fourteenth Amendment. The Rejection of the Cy Pres Alternative Must Rest on Similar Grounds*

The judgment of the Georgia court in this case must stand logically on a ground which the Fourteenth Amendment forbids any agency of the state government to occupy. The holding, on analysis, must rest on the proposition that, as a matter of law, the presence or proximity of Negroes, in any number, frustrates enjoyment, by whites, of a public amenity. This premise, as to the Negro race, is worse than "an assertion of their inferiority," *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). It is an assertion of their obnoxiousness. The Fourteenth Amendment strikes down a state decision resting, by irrestible implication, on such a shocking ground. See the opinion of Mr. Justice Stewart, concurring, in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961).[2]

The affirmative "purpose of the trust" established by Senator Bacon is not left obscure by him. It is the fur-

[2] Just as, in that case, there was no suggestion in the record that appellant was "offensive" to other customers, so there is no suggestion in this record that petitioners' presence "offends" whites to the extent of "frustrating" the purpose of a trust established for the benefit of the latter. Here, as there, the offensiveness of the Negroes is supplied, in effect, as a matter of law.

nishing of a public park to the whites of Macon. That purpose has not to any degree been "frustrated," in the normal sense of that word. The whites of Macon may still resort to Baconsfield just as freely as ever. There is not one scintilla of evidence in this record showing that the admission of Negroes as well either has diminished or faintly threatened to diminish the enjoyment of Baconsfield by whites. (If such evidence were ever to be offered in a proceeding of this sort, this Court would then have to consider whether such an issue of fact could ever be made in an American court.) The conclusion that this trust, clearly set up for the benefit of the whites of Macon, no longer benefits them, thus "frustrating" the affirmative purpose of the trust, must therefore rest on a conclusion, in effect one of law, that Negroes spoil a park for whites.

The only faint (and, it is submitted, illusory) hope of escape from this conclusion lies in the assertion that the exclusion of Negroes was itself a "purpose of the trust"—that is, one of the chief objects of its establishment. But to assert this is to assert a great absurdity, an absurdity too great to hide behind any generalities about "deference" to state courts; who would leave land in trust *for the purpose* of excluding Negroes? It is also to impute a truly sinister design to Senator Bacon, a design altogether inconsistent with his expressions of friendship for the Negro race. To call the exclusion of Negroes by Senator Bacon part of "the purpose of the trust" is to confuse the affirmative object he had in mind with a provision, incidental though important in his eyes, as to a collateral matter.

Confusion, but easily dispellable confusion, may be created by the fact that Bacon's will uses the word "sole . . . ." But the adjective "sole" does not denote a mode or degree of enjoyment. Unpacked, it says no more than that Negroes are to be excluded. It does not in any way

differ in its reference from an explicit and separate provision for their exclusion, and does not make it any the less "the purpose of the trust" that the whites of Macon shall enjoy Baconsfield.

The Georgia court, in its opinion, repeatedly recognizes that the purpose of this trust was the furnishing of a park for Macon whites, e.g., "It is clear that the testator sought to benefit a certain group of people, white women and children of Macon . . ."; "the beneficiaries being 'the white women, white girls, white boys and white children' of the City of Macon . . ."; "Senator Bacon selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty, in providing them with a recreational area."

Elsewhere, the Georgia court several times speaks of the total failure of this purpose, e.g., ". . . we are of the opinion that the *sole purpose* for which the trust was created has become impossible of accomplishment . . ."; ". . . the *sole purpose* . . . had become impossible of accomplishment . . ." (emphasis supplied).

It is interesting that these passages recognize and emphasize the unitary and simple character of this trust's object; it had a *"sole purpose."* But the passages previously quoted tell us, correctly, that this "sole purpose" was the furnishing of a park to the whites. There is no way whatever, therefore, to justify the judgment of the Georgia court, except on the basis that, as a matter of law, the proximity of Negroes destroys the value of the park for whites. That is the certain "hidden major premise" of the Georgia court's holding. (It is, of course, not petitioners' assertion that this proposition was consciously present to the Georgia court's mind.)

It is to be observed that this is emphatically not a case in which the court was asked to give effect to a provision

for reverter, in the event of Negroes' occupying or otherwise using property. That case can be decided when it is reached. Not even informally, not even by implication, did Senator Bacon provide for this reversion. (For full discussion of this point, and the Georgia court's admission thereon, see above, p. 38 et seq.)

It is then not Senator Bacon's will, in either sense of the word, that is being enforced. It is 1968 Georgia decisional law, and nothing else, that declares that a reversion is to be decreed when Negroes must be admitted to a place where a testator, in a will fifty-seven years old, has said they are not to go—though that testator did not himself provide for a reversion.

To sum up at this point, Georgia law provides for a resulting trust, in cases of this sort, only where the trust has "failed." Georgia Code, §108-106(4). This trust can be said to have "failed" only on one of two hypotheses:

(1) It was its "purpose"—its *affirmative* purpose in the sense that "failure" to attain that purpose is "failure" of the whole trust—to exclude Negroes. This is at once a sinister and an absurd interpretation, one to be rejected as soon as clearly stated. The Georgia court never espouses it; there is no indication Senator Bacon espoused it. For a state court to decree the forfeiture of property on such a premise would be to implement and support in the most drastic way a particularly noisome form of racism—and in this case to do so without even a support in the record for the settlor's having held such a view.

(2) It was the "purpose" of the trust, affirmatively, to furnish a park for white people, but that purpose "fails," even though white people may still use the park, because Negroes may also use it. Whatever words one uses to describe the evaluation of Negro presence on which this

alternative must rest—nuisances, obnoxious, detriments to enjoyment—the inescapable assumed premise is that, as a matter of law, the presence of Negroes causes white enjoyment to "fail." This is an impermissible ground under the Fourteenth Amendment.

If the Georgia court had had no alternative, under its state law, to decreeing reverter whenever *all* the particular terms of any trust could not be fulfilled, then a question of some complexity would be presented. We are spared the effort of analyzing this complex question, for Georgia law very plainly provided the court below with means of escape from a holding that a park must revert, and the underlying trust be treated as "failed," merely because some Negroes may now join the whites who continue to be beneficiaries in fact as well as in law.

The Georgia law of *cy pres* is codified in two sections of the Georgia Code:

> 108-202. *Cy pres.*—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.
>
> 113-815. *Charitable devise or bequest. Cy pres doctrine, application of.*—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

On their face, these statutes seem to command application of *cy pres* to just such a situation as the one which confronted the Georgia court in this case. As far as §108-202 is concerned, it is entirely plain that continuance of the trust on a nondiscriminatory basis effectuates Senator Bacon's intention "as nearly as possible." There would be a large variance from his intention, but that variation, however large, would be as small "as possible" under the Fourteenth Amendment. Under §113-815, the application of *cy pres* to this case would have carried out the general directive of the first clause, and operation of the park on a nondiscriminatory bases would, again, amount to its operation in the "manner most similar" possible to that Bacon directed.

The Georgia court, in the opinion below, treats quite briefly the contention that *cy pres* should have been applied—not citing either of these statutes. Only one case, *Ford* v. *Thomas,* 111 Ga. 493, is cited—for the proposition that the doctrine "cannot be applied to establish a trust for an entirely different purpose from that intended by the testator"; on examination, all that case held was that insufficient effort had been exerted to fulfill the purpose the testator stated.

It is stressed in the opinion that Senator Bacon desired the exclusion of Negroes—a point conceded by all, and one only opening the question whether *cy pres* should have been applied.

Respondents, in their brief in the Georgia court, say that the "one Georgia case we find to be of significance is *Adams* v. *Bass,* 18 Ga. 130." That case, decided before the Civil War, voided a trust for the resettlement of Negro slaves in free states, on the ground that the particular states named by the testator would not admit them. Of this case, perhaps the best thing one can say is that it was

decided before the adoption either of the present Georgia code or of the Thirteenth and Fourteenth Amendments.

After *Adams* v. *Bass,* no Georgia case has been found in which a trust was allowed to fail, when beneficiaries and trustee were still in being, and when the intended benefit could still be received, merely because the trust could not be carried out in the manner directed by the settlor. The very least one can say, therefore, is that the Georgia court was not bound by any of its precedents, by any of its statutes, or (as it concedes) by anything dispositive or even suggestive in Senator Bacon's will, to choose not to save this trust. The state court was entirely free, and indeed was forced, to make its own choice, as an agency wielding state power, between that action (the application of *cy pres*) which would have saved the trust, and that action (the one it took) which would destroy the trust.

We have to construct the rationale necessary to explain logically the court's ruling, for the grounds it gives are little more than conclusory. But these grounds can be constructed with certainty—not in the sense that they were consciously present to the mind of the Georgia court, which petitioners do not assert, but that they are logically necessary to the holding.

It is submitted that, in deciding not to apply *cy pres* to this trust, the Georgia court necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust. This policy decision, by the court, was inescapable. For the only other person who could have decided it was Senator Bacon, and he did not decide it. The Georgia court concedes that he did not decide it (see p. 38, *supra*). The record would not support a finding that he decided it, but would, on the contrary, conclusively show that he did not decide it.

It does not avail to stress (as the Georgia court, in its brief treatment of the *cy pres* contention, stresses) that Senator Bacon very seriously desired to keep Negroes out of Baconsfield. The Georgia statutes, on their face, clearly provide for *cy pres* in the very case, and only in the very case, where the settlor's intent *cannot* be given effect. The question posed to the Georgia court, then, was not whether *cy pres* would fulfill Senator Bacon's whole intent, but whether the variation from that intent was *undesirable enough* to inhibit the use of the clearly available device of *cy pres*. The judgment of the Georgia court, under whatever view of state law taken, is therefore a judgment that forfeiture of this park and total failure of Senator Bacon's scheme is to be preferred to the admission of Negroes.

Georgia's *cy pres* statutes merely open the way to an unavoidable choice between these alternatives; neither they nor anything else in Georgia law compel the choice made. As to ordinary state law questions of this form, it goes without saying the Georgia court's choice would be final. But in this case the choice was made in a direction which clearly implies espousal by the state court of an estimate that racial mixture is crucially undesirable. Such a decision is wrong as a federal-law matter.

This state court, then, had to decide whether this trust was to be taken to have "failed"; its "failure," if any, consisted in nothing more or less than the admission of Negroes to enjoy the park along with the intended beneficiaries, who still could themselves enjoy it. Its own *cy pres* doctrines opened an easy conceptual and procedural path, under state law, for avoiding the federally impermissible result of "failure" on such facts. But the Georgia court chose to reject that alternative, thereby inevitably espousing the proposition that enjoyment of a park by

whites *in the absence* of Negroes so fundamentally differs from enjoyment of a park by whites *in the presence* of Negroes as to go not to the question of "exact manner" (§108-202) or "particular mode" (§113-815), but rather to the essence. Since the essence of enjoyment is enjoyment, this must in turn imply that the presence of Negroes, as a matter of law, critically impairs white enjoyment. The ground for declaring "failure" of the trust, and the ground for rejecting *cy pres,* came down then (as one would expect) to much the same ground—a ground profoundly insulting to Negroes, and hence impermissible under the Fourteenth Amendment. *Strauder* v. *West Virginia,* 100 U.S. 303 (1880).

C. At Least Under the Highly Special Circumstances of This Case, the Provision for Racial Discrimination in Baconsfield Ought, as a Matter of Federal Law, Under the Fourteenth Amendment, to Be Treated as Absolutely Void. If This Is Correct, Then Federal Law Commands That This Trust Be Continued and That the City Continue as Trustee, for It Is Clear That Without the Racially Discriminatory Language Georgia Law Compels That Result. Similarly, Federal Law Commands That a Public Park "Dedicated" to the White Public Be "Dedicated" to the Negro Public as Well

Senator Bacon's will was drawn under the then recently-enacted authority of the present Georgia Code §69-504:

> *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other

> property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.)

It looked backward, then, to recently enacted state legislation for its indispensable authorization. Even more important, on its face it clearly looked forward to further and quite centrally important official connection with state power, for it provided that the City of Macon should be trustee. When the City of Macon accepted this position, the racially discriminatory provisions in the will became tantamount to city ordinances—part of the normative material promulgated and espoused by the City with respect to the conduct of its parks. Senator Bacon, an eminent lawyer, knew and clearly wished that this part of his will would speedily gain this official status as part of the City's rules with respect to the operation of its park. It would seem quite artificial to treat such provisions at any stage in their rapid and intended progress from explicit statutory sanction toward the status of being, in effect, ordinances, in a manner different from that in which one would treat ordinances themselves. Indeed, their character as "mere" expressions of Bacon's will was merged in their character as city ordinances on the day the City of Macon accepted the trust.

But is it not clear that a city ordinance, commanding exclusion of a race from a large park, would simply be

stricken? Could a Georgia court be permitted thereafter to close the park and give the property back to the former owners, on the ground that the known or declared "purpose" of the laws about parks was the provision of parks on a discriminatory basis? See *Griffin* v. *County School Board,* 377 U.S. 218 (1964). Would not any public-law material declaring such a "purpose" have to be similarly stricken?

It is submitted, therefore, first, that Senator Bacon's directions about the discriminatory conduct of Baconsfield were intended by him to achieve very quickly the status of city ordinances, and they did in fact achieve and hold that status. Secondly, it is submitted that their status in this regard makes it suitable to treat them as unconstitutional city ordinances are always treated—i.e., as nullities. If they are nullities, then there is not and never was any colorable ground for termination of the trust or for the City's resignation. When they are stricken, what remains is a public park.

It is worth pointing out that there lurks in this argument no problem about the retroactivity of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and its sequel cases, outlawing segregation even where "separate but equal" facilities were provided. The part of §69-504 which authorized racial exclusion, since it authorized the creation of city parks without provision for separate equal facilities, was unconstitutional on its face even under *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). The exclusion of Negroes from Baconsfield, a public park run by the city, was unconstitutional even under *Plessy* v. *Ferguson, supra,* unless separate but equal facilities were provided; this record shows none. Senator Bacon's testamentary provision for exclusion of Negroes rested, then, on an unconstitutional statute, and both contemplated and induced an unconsti-

tutional action by Macon—under 1910 standards as well as under 1969 standards. It would seem reasonable to treat a provision so sandwiched as though it were itself unconstitutional, and to strike it out as a matter of federal law, as one would strike out the part of §69-504 on which it rested, and the discrimination it contemplated and created.

This conclusion, in a deep but true sense, may be seen to rest on the philosophy of *Marsh* v. *Alabama,* 326 U.S. 501 (1946). That case held that, where a person dedicates his or its property to the public, or to a governmental use, there attaches an obligation to respond to the norms of the Constitution, as these regulates governmental action. It would be harmonious with this philosophy to hold that as soon as a testator, like Bacon, publishes a will dedicating his property to serve as a public park, and even goes so far as to make the City of Macon his trustee for this purpose, so as to effect the incorporation of his rules for running the park into the City's own fabric of law, then these directions, if repugnant to the Constitution, are to be treated as official rules repugnant to the Constitution are treated—by looking on them as null and void. A constitution which forces color-blindness on the city ought to be held to force color-blindness on one who proposes to use and succeeds in using the city as agent of his will.

More in fairness to Senator Bacon's memory than in strict relevance to this point, it should again be emphasized that there is no reason whatever for thinking that Senator Bacon would have disagreed. We simply have no way of knowing whether, if he had been told that this park could not be operated at all on a discriminatory basis, he would have chosen that it be operated for all. Treating his racial directions as *pro non scripto,* as the nullities they would unquestionably be if considered as sections in a city code, may, for all we know, do far

less violence to what his wish would have been than is done by the Georgia court in awarding Baconfield to his heirs, for such fate as marketable city property may have—including likely occupancy, and even ownership, by Negroes. The choice to overthrow his scheme *in toto* is not one that can be justified by respect for the wishes of a dead man; his choice, among the choices now open, is not knowable or even probably inferable. The choice is solely that of the 1968 Georgia court. And it is submitted that as a matter of federal law that court ought to be held to treating the racial exclusionary provisions as nullities.

The underlying assumption, in the very similar case of *Commonwealth of Pennsylvania* v. *Brown,* 392 F.2d 120 (3rd Cir. 1968), cert. den. 391 U.S. 921 (1968),involving the Girard College Trust seems clearly to be that the word "white," in a will turning property over to the public for a public use, is to be treated as a nullity. It seems unthinkable that the court uttering such a judgment could hold that, after all, the Girard property may revert to his heirs. Cf. *Sweet Briar Institute* v. *Button,* 280 F. Supp. 312 (W.D. Va. 1967), rev'd *per curiam,* 387 U.S. 423, decision on the merits, 280 F. Supp. 312 (1967).

Another and rather closely parallel route to considering this racially restrictive language as a nullity is to be found in the fact that this park, having unquestionably been "dedicated" to the white public, must, as a result of the federal command of equality, be taken to have been "dedicated" to the Negro public as well.

The regular way of creating a public park in Georgia, prior to the enactment of Georgia Code §69-504, was by dedication to the public, with reciprocal public easements. See *Macon* v. *Franklin,* 12 Ga. 239, and the summary

on this point in this Court's opinion in this same case, *Evans* v. *Newton*, 382 U.S. 296, 300, n. 3 (1966).

Section 69-504, enacted in 1905, while permitting racial discrimination, expressly retains the concept of "dedication":

> *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance *dedicated in perpetuity* to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.) (Emphasis added.)

Now, when this park passed into the trusteeship of the city of Macon, thereupon it became the fixed right of all Negro citizens of Macon to be treated, with respect to their rights in the park, just as the white citizens were treated. This record shows no "separate but equal" facilities in 1914 or at any other time. The enjoyment of easements by whites, but not by Negroes, in a park under city trusteeship, was therefore unconstitutional

even under *Plessy* v. *Ferguson.* (See *supra,* pp. 51-52.) It can make no difference that Negroes were not positioned in knowledge or in power to enjoy their rights.

But even if it be thought that this arrangement was not unconstitutional under *Plessy,* and even if (contrary to the general rule) *Brown* v. *Board of Education, supra,* and cases following are not taken as declaring the rule that had been correct all along, but only of force prospectively, it is nevertheless indisputable that, at some time years prior to this litigation's commencement, it became clear that as a matter of federal constitutional law, the Negro citizens of Macon must possess, in respect of this city—trusteed park, just exactly the same rights as the white citizens of Macon. Since it cannot be contested that the park was "dedicated" to the use of the latter, it must equally, by operation of federal law, be taken to be "dedicated" to the use of the former—not because Georgia law commanded that result, not because Senator Bacon intended that result, but because federal law, in commanding equality, necessarily commanded that result.

All interested parties, including the parties to this litigation, have acted all along, since the question was first raised, on the assumption that discrimination while the City was trustee was clearly unconstitutional. But it has not been so clearly noted that, as a corollary of this proposition, it must be true, since the park was under §69-504 and Senator Bacon's will unquestionably "dedicated" in perpetuity to the whites, by operation of the federal command of equality, the park stands "dedicated" in perpetuity to the Negroes as well.

Since the point of "dedication" was raised in the assignments of error in the Georgia Supreme Court, and since it was fully briefed there, it is surprising to find

that it is not dealt with in that court's opinion. There is a brief reference in the opinion to the Order and Decree of the Bibb County Court; the passage referred to is thus the only place one can look for a reasoned statement of the Georgia court's grounds for rejecting the "dedication" argument:

> It is clear that the testator sought to benefit [the whites] and the language of the will clearly indicates that the limitation to this class of persons, was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the use of the general public.

It is petitioners' contention, as just set out, that this conclusion is wrong, not as a matter of state law, but as a matter of federal law, for the precise reason that it takes no account of the fact that federal law commanded equal rights—whether as holders of easements, or as beneficiaries of "dedication"—for Negroes. As a net integral sum, adding the effect of Bacon's will, under Georgia law, to the effect of federal law on the situation thus created, Baconsfield was "dedicated" to all.

If Baconsfield, then, by the joint operation of Georgia and federal law, was "dedicated" to use as a park by whites and by non-whites, then it seems plain that under Georgia law that dedication is not retractable. Granting *arguendo* that the "purpose" of Senator Bacon's *trust* has failed (but see above, point B), the *uses* to which the park is "dedicated" have not failed.

Some confusion may be created by the juxtaposition of the concepts of "dedication" and "trust." These concepts are not at war under Georgia law—or, for that matter, under Anglo-American law in general. Section

69-504, just quoted, makes it plain that Georgia law sees no difficulty in lands being *both* under trusteeship *and* dedicated to the public. For the "appropriate conveyance" under §69-504 may be in fee simple *or* in trust, but which ever of these sorts of conveyances is chosen, the lands are to be "dedicated in perpetuity to the public use. . . ." There is no difficulty about this double aspect of the creation of a park. The legal title to land may be held by a trustee, and the duties of his (or its) trusteeship may include, for example, maintenance, while simultaneously the land may be "dedicated" to the public, with public easements upon it. These arrangements are complementary and not contradictory. Somebody, whether or not a trustee, always holds underlying title to land over which easements run.

The holding, then, that Baconsfield was not treated as "dedicated" to the public, with all that must imply under Georgia law, rests essentially on a wrong reading or disregard of the federal command of equality. Such a holding obviously cannot be allowed to stand.

The thoroughness of the "dedication" in this case is emphasized (if emphasis be needed) by reference to the public subsidies and aids this park has received. The record abounds with details of maintenance, tax exemption, and even substantial federal aid. State power compelled and solicited these aids, and can have done so only on the theory that the park was "dedicated" as a park. It would be anomalous in the extreme for that same state power, acting through a different agency, now to be allowed to say that this park was not, after all, "dedicated" to a public use. And if it was dedicated to a public use, it was necessarily dedicated to use by all races, under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Letter Opinion of Superior Court

State of Georgia

SUPERIOR COURTS OF THE MACON JUDICIAL CIRCUIT

Macon, Georgia

December 1, 1967

Chamber of:
Hal Bell
C. Cloud Morgan
Geo. B. Culpepper, III
Judges

Bibb, Crawford
Peach and Houston
Counties

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Letter Opinion of Superior Court

Honorable George J. Hearn, III
Assistant Attorney General
State Capitol
Atlanta, Georgia

Re: Charles E. Newton, et al
v. City of Macon

(Renewed Baconsfield Proceeding)

No. 25864, Bibb Superior Court

Gentlemen:

In passing upon the motion for summary judgment filed by the heirs of Senator Bacon I see no need to recite any of the pleadings, history or rulings of this Court, the Supreme Court of Georgia, or the Supreme Court of the United States, except as they may bear directly upon the issue raised by the motion.

The final order and decree of this court of March 10, 1964, was appealed to and affirmed by the Supreme Court of Georgia on September 28, 1964, and on writ of certiorari the United States Supreme Court reversed the judgment of the Supreme Court of Georgia on January 17, 1966. Thereafter on March 14, 1966, the judgment of the United States Supreme Court was made the judgment of the Supreme Court of Georgia, reversing and vacating the prior judgment of this Court. The Georgia Supreme Court remanded the case of this court for further proceedings consistent with the decision of the Unted States Supreme Court and specifically directed this court to pass on contentions of the parties not passed on previously.

In its decision of June 17, 1966 the United States Supreme Court ruled that Baconsfield could no longer be

operated for the exclusive benefit of white persons and ruled this was so whether the City of Macon remained as trustee or whether private trustees were appointed.

Movants contend that because of the January 17, 1966 decision of the United States Supreme Court Senator Bacon's trust became unenforceable and Baconsfield and the funds held for its support reverted at that time into Bacon's estate by operation of law. They contend further that the Supreme Court of Georgia on March 14, 1966 recognized this had occurred when the court expressed the opinion that the "sole purpose for which this trust was created has been terminated." Movants contend that this judgment of the Supreme Court of Georgia declaring what had transpired in regard to the title is now the law of the case and further that it remains only for this court at this time to give effect to said reversion of title.

Other relief sought in the motion for summary judgment is briefly stated as follows:

(1) The dismissal of the City of Macon as not now being a necessary party to this proceeding,

(2) An order allowing the Successor Trustees, Hugh M. Comer, Lawton Miller and B. L. Register to be relieved of any further duties except to account for the legal title to the trust properties, assets, etc.

(3) That the members of the Board of Managers be allowed to file an accounting of their acts and of the funds in their hands and then be released and acquitted from further liability,

(4) That one or more persons be appointed to take possession and custody of the properties, assets and funds of the charitable trust and to protect and manage the same

under the further orders and directions of this Court and to transfer the title thereto and possession to the persons entitled to receive the same and

(5) That the relief prayed for by intervenors, Reverend E. S. Evans, et al, be denied.

Intervenors, Reverend E. S. Evans, et al, the only parties to object, appeared and filed objections to the motion for summary judgment and submitted evidence concerning the expenditure of tax monies of the City in the operation and maintenance of Baconsfield Park and in the building of a swimming pool located on the property. Evidence was also offered concerning the expenditure of funds by the Federal Government under the W.P.A. program in the furnishing of labor in the construction of Baconsfield clubhouse.

With reference to the evidence submitted by both the intervenors and movants there is little, if any, dispute as to the facts. The evidence is conclusive that Baconsfield park was at all time under the direct control and supervision of the Board of Managers and that funds realized from the handling of commercial properties were used in the improvement and operation of the park.

I have carefully considered the pleadings, the evidence and the brief of argument submitted by counsel for the intervenors, Reverend E. S. Evans, et al, and also the pleadings, the evidence and the brief of argument submitted by counsel for the Bacon heirs.

It is my considered opinion that when the Supreme Court of the United States rendered its decision in Evans v. Newton, 382 U. S. 296, 86 S. Ct. 486, 15 L.E. 2nd, 373 (1966) holding in a divided opinion that Baconsfield might not in the future be operated as a facility for the sole benefit of white persons, as specified in Senator Bacon's will, the

trust failed, and the property reverted to Bacon's estate by operation of law.

It is my opinion, contrary to the contention of counsel for the intervenors, Reverend E. S. Evans, et al, that the doctrine of cy pres is not applicable to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys, and white children of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

I have considered the argument of counsel for the intervenors, Reverend E. S. Evans, et al, concerning their contention that "Baconsfield Park has been dedicated to the public and a public easement has been created which cannot be defeated merely by the termination of the trust". In my opinion it is clear that there has been no dedication of Baconsfield as a park for the use of the general public. The trust was created for a limited purpose, i.e., for the sole, perpetual and unending, use benefit and enjoyment of the white women, white girls, white boys and white children of Macon. It is therefore my opinion that the concept of dedication raised by counsel for the intervenors is without application in this case.

With reference to the contention of the intervenors in regard to the Bacon heirs being estopped, there is nothing in the record to support this contention.

It is my opinion that Shelley vs Kramer does not support the position of the intervenors. It is further my opinion that

no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reversed by operation of law in accordance with well settled principles of Georgia property law.

Counsel for the Bacon heirs will please prepare an order in accordance with the above for the Court's consideration, furnishing a copy of the same to counsel for the other parties.

Yours very truly,

O. L. Long
O. L. Long, J.S.C.M.C. Emeritus

Filed in Office, 14 day of May, 1968
Lillian Lavine, Deputy Clerk

Superior Court Order and Decree

IN THE

SUPERIOR COURT

OF BIBB COUNTY, GEORGIA

No. 25864

CHARLES E. NEWTON, *et al.*,

—v.—

CITY OF MACON, *et al.*

ORDER AND DECREE

The above case was heard on Motion for Summary Judgment filed November 10, 1966, in behalf of Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee as Successor Trustees under Item 6th of the will of Augustus Octavius Bacon, deceased, who for convenience will be referred to as Senator Bacon. Said case was heard upon remand from the Supreme Court of Georgia for further proceedings in this Court consistent with its decision and with the decision of the Supreme Court of the United States of January 17, 1966, with specific direction to this Court to pass on contentions of the parties not passed on previously.

Said Motion and the rule nisi issued thereon were duly served upon all parties and responses thereto were filed. Various witnesses were examined by deposition and both supporting and opposition affidavits were filed. Additional parties were made and the Motion was duly assigned for

hearing and was heard in open court. The parties through their respective counsel made oral arguments and within the time allowed for that purpose by the Court filed written briefs, all of which were carefully considered.

Having taken the case under consideration the Court on December 1, 1967, advised all attorneys of record by letter of its findings and conclusions. A copy of said letter of December 1, 1967, is filed with the Clerk as a part of the record in said case, and by reference is incorporated herein as findings and conclusions of the Court. This decree is entered pursuant to and in accordance with the findings and conclusions therein and herein made.

IT IS NOW, THEREFORE, CONSIDERED, ORDERED AND DECREED BY THE COURT AS FOLLOWS:

(1) The Court has jurisdiction of the subject matter of the case and of the parties, and all necessary parties are properly before the Court. All parties have been given opportunity to be heard, and to present either supporting or opposition affidavits or responses, and all parties have been heard upon the issues involved.

(2) Rev. E. S. Evans and others as members of the Negro race were allowed to intervene in opposition to the complaint on behalf of themselves and other Negroes similarly situated as a class, and as intervenors to challenge the validity of certain of the provisions of the will of Senator Bacon and to seek relief against the petitioners. Upon appeal by them from the prior judgment of this Court the Supreme Court of the United States on January 17, 1966, ruled that Baconsfield Park could no longer be operated for the exclusive benefit of white persons as clearly provided by Senator Bacon's will, and that ruling

is now the law of this case. Consistent with the further provisions of this decree no sufficient cause is shown for the grant of other or further relief to said intervenors, and the relief prayed for by them is denied.

(3) By virtue of and upon the aforesaid decision of the United States Supreme Court of January 17, 1966, the essential purpose of the trust established by Items 9th and 10th of Senator Bacon's will was voided and became impossible of performance and said trust thereupon failed and was terminated.

The Court finds and concludes, contrary to the contention of counsel for the intervenors, Reverend E. S. Evans, et al., that the doctrine of cy pres is not applicable to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys, and white children of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has considered the argument of counsel for the intervenors, Reverend E. S. Evans, et al., concerning their contention that "Baconsfield Park has been dedicated to the public and a public easement has been created which cannot be defeated merely by the termination of the trust." It is clear that there has been no dedication of Baconsfield as a park for the use of the general public. The trust was created for a limited purpose, i.e., for the sole, per-

petual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of Macon. It is therefore the Court's conclusion that the concept of dedication raised by counsel for the intervenors is without application in this case.

With reference to the contention of the intervenors in regard to the Bacon heirs being estopped, there is nothing in the record to support this contention.

It is my opinion that Shelley vs. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reverted by operation of law in accordance with well settled principles of Georgia property law.

Under the laws of the State of Georgia on January 17, 1966, the title to and right to possession of the trust assets reverted automatically by operation of law to Senator Bacon, or to his heirs or estate, and it is declared and adjudged that such title to and right to possession has so reverted.

(4) Under the decision and mandate of the Supreme Court of Georgia reversing the prior judgment of this Court the trust property was left without a trustee. In view of the failure and termination of said trust and the reversion by operation of law of the trust assets, it is not necessary that there be a trustee.

(5) The prior order of this Court accepting the resignation of the City of Macon as Trustee and appointing Successor Trustees is vacated. Nevertheless, since the City of Macon has no trust assets in its hands to be ac-

counted for, and has reaffirmed its resignation and has again announced its refusal to serve as Trustee, and requested its discharge from the case, no further order of this Court with respect to the resignation of the City of Macon is necessary. The City of Macon having no further trust duties to perform or trust assets to be accounted for is dismissed as a party to this case.

(6) The Successor Trustees who were appointed by this Court have acted under their appointment as de facto Trustees and their acts and doings in that capacity are ratified and approved insofar as they have acted in accordance with the direction and authority given to them by virtue of their appointment. Specifically this includes the appointment by them of the Board of Managers to perform the duties and functions imposed upon the Board of Managers established under Senator Bacon's will and the acts and doings of said Board of Managers are similarly ratified and approved insofar as they have acted in accordance with the terms of Senator Bacon's will applicable to them and under the authority and directions given to them by this Court.

(7) The Successor Trustees appointed by this Court and the Board of Managers appointed by them with the approval of this Court shall within thirty days after the date of this order file in the office of the Clerk of this Court detailed reports of their acts and doings in their respective capacities, (1) listing and identifying the trust assets, properties and funds in their hands, and (2) showing and accounting for their receipts and disbursements. Objections to said reports and accountings may be made by any party desiring to object thereto within thirty days from

the date of the filing of said reports and accountings, and upon the expiration of said periods of time said reports and accountings shall be submitted to the Court for its approval or disapproval. Copies of said reports and accountings shall be served upon all attorneys of record in this case who shall be notified of the date of filing and of the time within which objections thereto may be filed. Upon approval of such reports and accountings the Successor Trustees appointed by this Court and the Board of Managers appointed by them shall be thereupon discharged and dismissed as parties to this litigation.

(8) For the purpose of receiving the reports and accountings to be made by the Successor Trustees and by the Board of Managers, as above described, and for the further purpose of preserving and administering the assets, property and funds until this decree becomes final, Guyton G. Abney and Willis B. Sparks, Jr. are named and appointed as Receivers. Copies of said reports and accountings shall be served upon them as upon other parties, and objections thereto may be filed by them as by other parties. Upon the filing of said reports and accountings all cash funds and other assets of the trust shall be paid over to the Receivers and receipted for by said Receivers, to be held and administered by them under the further direction of this court.

(9) Said Receivers are authorized and empowered to hold and manage the trust properties and assets under the further orders and directions of the Court until such time as they are directed by this Court to deliver and pay them over to the person or persons entitled thereto after this decree has become final. The Receivers are authorized

to recognize and continue in effect any and all contracts or other commitments with respect to the trust properties heretofore entered into or made by the Successor Trustees, or their predecessor trustee, or by the Board of Managers at any time and however constituted, whether de jure or de facto, and to enter into other contracts and commitments normally incident to the management and preservation of the trust properties which are limited in duration to not exceeding one year, all without the necessity of seeking further direction by or approval of the Court. Subject to the right of any party to this case to file objections thereto which will be heard by the Court, the Receivers may apply for and obtain authority to enter into contracts and commitments extending longer than one year.

(10) The aforesaid Successor Trustees and members of the Board of Managers shall not receive any compensation for services heretofore or hereafter rendered by them but shall be allowed all reasonable and proper costs and expenses which they have incurred, including the cost and expense of employing agents or other employees in the performance of their duties, and including costs, expenses and obligations incurred by them in the conduct of this litigation, specifically including the compensation of attorneys employed by them, or by their predecessors, in the conduct of this litigation or in connection with the management and operation of the properties and assets of said trust. Application shall be made to this Court for the approval of the compensation to be paid to their attorneys, and appropriate order will be made for such payment either out of the funds in the hands of the Receivers or as a charge upon the properties and assets in

the hands of the persons to whom said assets are distributed.

(11) The costs of this proceeding to be taxed by the Clerk including all prior costs on appeal are assessed against the properties in the hands of the Receivers and shall be paid out of these assets.

(12) Said trust having failed and terminated and the title to said assets having reverted by operation of law it is determined and decreed by the Court that said title has by operation of law vested as follows:

(a) One-half interest in Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as Successor Trustees under Item 6th of the will of Senator Bacon for the benefit for life of Shirley Holcomb Curry, Marie Louise Lamar Curry and Manley Lamar Bacon Curry, surviving children of Augusta Lamar Bacon, deceased, and upon their deaths as provided therein.

(b) The remaining one-half thereof in equal shares in fee simple in Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Garten Sparks and in The Citizens and Southern National Bank and Willis B. Sparks, Jr. as Executors of the Will of A. O. B. Sparks, deceased.

(13) This Court retains jurisdiction of this case for the purpose of acting upon the reports and accountings to be made by the Successor Trustees and successor Board of Managers, and giving direction with reference thereto, for the purpose of acting upon all applications of attorneys and others for compensation payable to them, for the purpose of receiving and acting upon reports and appli-

cations to be made by the Receivers appointed by this Court as hereinabove provided, and fixing their compensation, for any other or further decree or order of this Court necessary or appropriate to the enforcement of this decree, and for any other purpose not inconsistent with the provisions of this decree.

This 14 day of May, 1968.

O. L. Long
J.S.C.M.C., Emeritus

Opinion of Georgia Supreme Court

Supreme Court of Georgia Decided DEC—5 1968

24782. EVANS et al. v. ABNEY, Trustee, et al.

The trial court did not err in entering a summary judgment holding that the trust created by the will of Senator A. O. Bacon had failed and that the trust property reverted to his heirs.

ARGUED SEPTEMBER 9, 1968—DECIDED DECEMBER 5, 1968.

Equitable petition; trust. Bibb Superior Court. Before Judge Long, Emeritus.

William H. Alexander, Jack Greenberg, James M. Nabrit, III, for appellants.

Jones, Cork, Miller & Benton, Charles M. Cork, Frank C. Jones, Timothy K. Adams, Trammell F. F. Shi, George C. Grant, Arthur K. Bolton, Attorney General, for appellees.

MOBLEY, Justice. This appeal is from an order of Bibb Superior Court which held that a trust created by Senator A. O. Bacon in his will dated March 28, 1911, providing for a park in the City of Macon, to be called Baconsfield, for the benefit of "white women, white girls, white boys and white children of the City of Macon," had failed and the property would revert by operation of law to the heirs at law of Senator Bacon.

The litigation was commenced in May, 1963, when Charles E. Newton and others, as members of the Board of Managers of Baconsfield, brought a petition against the City of Macon, as trustee under the will of Senator Bacon, and Guyton G. Abney and others, as successor trustees under

the will, holding assets for the benefit of residuary beneficiaries, asserting that the City of Macon was failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield, and praying that the city be removed as a trustee. Reverend E. S. Evans and others, Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention, contending that the restriction in the trust limiting the use of the park to white women and children was illegal, and praying hat the general charitable purpose of the testator be effectuated by refusing to appoint private persons as trustees. The heirs at law of Senator Bacon also intervened, praying that, if the relief sought by the original petitioners not be granted, the property revert to the heirs. The City of Macon in its answer alleged that it could not legally enforce segregation. The city later amended its answer, alleging that it had by resolution resigned as trustee under the will, and praying that its resignation be accepted by the court. The superior court accepted this resignation by the City of Macon and appointed new trustees. On appeal by the Negro intervenors from this judgment, this court affirmed the judgment of the trial court. For a full statement of the pleadings see *Evans* v. *Newton,* 220 Ga. 280 (138 SE2d 573).

The Supreme Court of the United States granted writ of certiorari and reversed the judgment of this court, holding in part: "Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for

the public on a segregated basis, the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot say that the transfer of title per se disentangled the park from segregation under the municipal regime that long controlled it." *Evans* v. *Newton,* 383 U.S. 296, 302 (86 SC 486, 15 LE2d 373).

The judgment of the Supreme Court of the United States was made the judgment of this court. The opinion of this court remanding the case to the trial court was in part as follows: "When this case was before us for review, we sustained the orders of the trial judge accepting the resignation of the City of Macon as trustee of Baconsfield and appointing new trustees. The Supreme Court of the United States, in the general reversal of the judgment of this court, did not, in the majority opinion, make any specific ruling on the right of the City of Macon to resign as trustee or that new trustees could not be appointed. The resignation of the City of Macon as trustee of Baconsfield because of its inability to carry out the provisions of the trust being an accomplished fact (and we know of no law that could compel it to act as trustee) and the order of the court appointing new trustees having been reversed, the trust property is without a trustee. Even if new trustees were appointed, they would be compelled to operate and maintain the park as to Whites and Negroes on a non-discriminatory basis which would be contrary to and in violation of the specific purpose of the trust property as provided in the will of Senator Bacon. Under these circumstances, we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated. See

Restatement (Second) Trusts §335. 'Where a trust is expressly created . . . [and] fail[s] from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.' *Code* §108-106(4))." *Evans* v. *Newton,* 221 Ga. 870 (148 SE2d 329).

On remand of the case to the Superior Court of Bibb County, a motion for summary judgment was filed by Guyton G. Abney and others, as successor trustees under the will of Senator Bacon. After consideration of depositions and affidavits, the Superior Court of Bibb County entered a summary judgment decreeing as follows: The relief prayed by Reverend E. S. Evans and other Negro intervenors is denied. Under the decision of the United States Supreme Court the essential purpose of the trust creating Baconsfield in Senator Bacon's will has become impossible of performance, and the trust has failed and is terminated. The doctrine of cy pres is not applicable to the trust creating Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, white women and children of Macon, and the language of the will clearly indicates that the limitation to this class of persons was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the use of the general public. There is nothing in the record to support the contention that the Bacon heirs are estopped from claiming a reversion to them. The property has reverted by operation of law to these heirs. In view of the termination of the trust, it is not necessary that there be a trustee. The City of Macon having no further trust duties to perform or trust assets to account for, is dismissed as a party to the case. Certain acts and doings of the de facto successor trustees are

ratified and approved. Receivers are appointed. The title to the assets of the trust property are decreed to be in the heirs at law of Senator Bacon.

The Negro intervenors appealed from this judgment, enumerating as error each of the findings of the trial court, and the failure to find that Baconsfield should be operated as a public park on a non-discriminatory basis. The intervenors contend that they have been denied due process of law and equal protection of the laws under the Constitution of the United States by the rulings made, and that the judgment does not follow the mandate of the Supreme Court of the United States.

1. The intervenors urge that the doctrine of cy pres should be applied to Senator Bacon's will, and that the nearest effectuation of the intention of Senator Bacon would be to operate the park for the benefit of all citizens of the City of Macon. The doctrine of cy pres is expressed by *Code* §108-202 as follows: "When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention."

Senator Bacon in the provision of his will creating Baconsfield was specific in listing the persons for whose benefit the trust was created, the beneficiaries being "the white women, white girls, white boys and white children of the City of Macon." He empowered the board of managers to exercise their discretion in also admitting "white men of the City of Macon, and white persons of other communities." He left no doubt as to his wish that the park be operated on a segregated basis. After expressing

his kind feelings toward persons of the Negro race, he stated his reasons for limiting the beneficiaries of the trust to white persons as follows: "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

The doctrine of cy pres can not be applied to establish a trust for an entirely different purpose from that intended by the testator. *Ford* v. *Thomas,* 111 Ga. 493 (36 SE 841). In the opinion of this court remanding the case to Bibb Superior Court it was held that the sole purpose for which the trust was created had become impossible of accomplishment and the trust had terminated. This was, in effect, a determination that the doctrine of cy pres could not be applied to Senator Bacon's will so as to authorize the operation of the park for the benefit of the public generally. The intervenors sought no review of this ruling by the Supreme Court of the United States, and it has become the law of the case. The ruling now under review that the doctrine of cy pres can not be applied is consistent with the opinion of this court in *Evans* v. *Newton,* 221 Ga. 870, supra.

2. It is contended by the intervenors that Baconsfield was created under the provisions of Code § 69-504, authorizing any person to convey, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, lands for park or pleasure grounds, limited to the use of one race only, or women and children of one race only, and that this Code section violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. To hold that the trust provision of Senator Bacon's will was made pursuant to an unconstitutional

Code section, would have the effect of making the trust impossible of performance (*Smith* v. *DuBose*, 78 Ga. 413, 434) (3 SE 309, 6 ASR 260), and thus cause a reversion under Code § 108-106 (4).

3. It is contended by the intervenors that Senator Bacon's will should be construed to grant all reversionary interest in Baconsfield to the City of Macon. This assertion is based on language in the will vesting all title and interest, "including all remainders and reversions," to the City of Macon in trust for the persons specified.

Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the intervenors appears in the following provision of the will: "When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc." This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision. The reversion to the heirs at law is not under the terms of his will but occurs because of the provision of our law that where an express trust fails from

any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs. *Code* § 108-106 (4).

4. It is asserted that the City of Macon acquired all of the interest in Baconsfield of the heirs and trustees of Senator Bacon by a deed dated February 4, 1920, and that the heirs and trustees are now estopped from asserting an interest in Baconsfield. This position is not tenable. The City of Macon does not assert that it has fee simple title to Baconsfield. Senator Bacon in Item 9 of his will designated certain property of his estate to form the park to be known as Baconsfield. This property was placed in trust in the hands of named trustees, first for the benefit of his wife and two daughters, and after their death, for recreational uses of white women and children. The testator expressly denied the trustee any right to sell the trust property. The deed of the trustees dated February 4, 1920, was made in consideration of $1,665 annually during the life of the remaining daughter of Senator Bacon and the expenditure of $650 annually by the city for the improvement of the park, and its purpose was to allow the city to develop the property as a recreational area prior to the death of the remaining life tenant. It did not purport to convey any reversionary interest of heirs of Senator Bacon in the event the recreational park trust should terminate.

5. It is contended that, in obedience to the mandate of the United States Supreme Court, the City of Macon should be ordered re-instated as trustee of Baconsfield and directed to operate the park on a nonsegregated basis. The opinion of the Supreme Court of the United States held that the park could not be operated for the public on a

segregated basis and generally reversed the judgment of this court affirming the judgment accepting the resignation of the City of Macon as trustee and appointing new trustees. The United States Supreme Court did not decide the question of whether the trust would terminate because of the inability of the trustees to effectuate the testator's purpose in creating the trust. With the termination of the trust, there is no question as to the right of the City of Macon to resign as trustee, since there can be no trustee without a trust to administer. Neither can there be an estoppel against the acceptance of the city's resignation as a trustee, where the trust has terminated, because of the expenditure of public money in the development of the park. Compare *Bennett* v. *Davis*, 201 Ga. 58 (39 SE2d 3).

6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Superior Court of Bibb County holding that the trust has failed and the property has reverted to Senator Bacon's estate by operation of law. We recognize the rule announced in Shelley v. Kraemer, 334 U.S. 1 (68 SC 836, 92 LE1161, 3 ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.

Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recrea-

tional area. They have not been deprived of their right to inherit, because they were given no inheritance.

The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discriminatory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

Judgment affirmed. All the Justices concur.

Order of Georgia Supreme Court

SUPREME COURT OF GEORGIA

ATLANTA, December 5, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

E. S. Evans et al. v. Guyton G. Abney, Trustee, et al.

This case came before this court upon an appeal from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.